No. 98-775

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GORDON MILLER,

Petitioner,

v.

FRED VANNATTA, GEORGE BOEHNKE,
AND CENTER TO PROTECT FREE SPEECH, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

BRIEF OF AMICUS CURIAE OREGON STATE PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF PETITIONER.

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Interest of Amicus Curiae

The Oregon State Public Interest Research Group ("OSPIRG") submits this brief in support of the Petition for Certiorari filed by defendant-intervenor Gordon Miller.[1] Pursuant to Supreme Court Rule 37(2)(a), this brief is accompanied by written consents from all parties.

OSPIRG is a non-profit, non-partisan citizens watchdog organization with over 25,000 members across the state of Oregon. Its mission is to promote the public interest in all decision-making forums, and it focuses especially on the state legislature, state regulatory agencies, local government, litigation, and the state initiative process. OSPIRG works on a broad range of policy areas, including environmental preservation, public health, consumer protection, and good government. OSPIRG has emerged as a leading organization dealing with campaign finance policy in Oregon and has an interest in promoting an elections system where all citizens have an equal right to cast an undiluted and undiminished vote.

OSPIRG believes that Oregon's campaign finance system allows entities and citizens from outside of Oregon to influence the outcome of Oregon elections and the outcome of policy decisions made in Oregon to the detriment of the general public interest of Oregonians.

OSPIRG's executive director, Maureen Kirk, is a prominent figure in Oregon's public policy arena. The 12

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[1] This brief has been authored entirely by counsel for OSPIRG. Further, no person or entity other than OSPIRG has made a monetary contribution to the preparation or submission of the brief.

staff who work with OSPIRG and its related organizations conduct research on important problems, develop policy solutions to issues of public concern, educate the public and decision makers about these problems and solutions, and advocate for the passage of solutions at every level in government. OSPIRG does not endorse or support candidates for political office in any manner, nor does it make contributions to candidates or parties. The staff are heavily involved in media work, college student organizing, reaching out to community organizations and opinion leaders, and conducting door-to-door campaigns to speak with tens of thousands of Oregonians each year about issues of concern. The outcome of this litigation will have a direct impact on OSPIRG's ability to organize Oregon citizens to promote issues of concern to them through these methods.

Summary of Argument

1. The geographical distinction drawn by Measure 6 between in-district and out-of-district campaign contributors is permissible because geography is part of our very notion of what a governmental unit is. Measure 6 is entitled to deference as an effort to enhance self-government by strengthening the connection between local electorates and their elected representatives.

2. The restriction Measure 6 imposes on the First Amendment rights of those residing out of district is benign because, among other things, the restriction, by advancing communal thought processes and strengthening self-government, itself serves and advances First Amendment interests.

3. Measure 6 is a permissible exercise of state sovereignty, analogous to the federal prohibition against campaign contributions by foreign nationals. Like the "political function" exception to the rule that discrimination based on alienage triggers strict scrutiny, Measure 6 is justified as part of a community's process of political self-definition.

4. Upholding Measure 6 would be in the best interests of dynamic federalism because, among other things, a state's power over its own elections lies at the very heart of state sovereignty. Further, upholding Measure 6 would help enable states to innovate and experiment, in the best tradition of the federalist system, in the vital area of campaign finance reform.

5. Because, by its nature, campaign finance reform is threatening to officials elected under the system sought to be reformed, reforms passed at the state level are frequently passed by initiative, rather than legislative, vote. Accordingly, neither the fact that Measure 6 was passed by initiative, nor the fact that the petition for certiorari before the Court was filed by intervenor Miller rather than Oregon's Attorney General, himself an elected official, should deter the grant of certiorari. On the contrary, that Measure 6 was passed directly, by the votes of 628,180 Oregonians, actually makes this case a particularly appropriate one for resolving the important issues presented.

Argument

Preliminary Statement

In Buckley v. Valeo, 424 U.S. 1, 48-49 (1976), this Court declared that

> the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .

At the same time, however, this Court has repeatedly recognized a state's

> interest in protecting the integrity, fairness, and efficiency of [its] ballots and election processes as means for electing public officials.
>
> Timmons v. Twin Cities Area New Party, 117 S.Ct. 1364, 1373 (1997).

And the cases of this Court have in particular

> uniformly recognized that a governmental unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.
>
> Holt Civic Club v. Tusealoosa, 439 U.S. 60, 68-69 (1978).

The novel and important issue presented here is whether Measure 6's restriction of out-of-district campaign contributions to candidates for state office is properly viewed as an unconstitutional restriction on out-of-district voices or a legitimate exercise of Oregon's power to enhance self-government, safeguard the integrity of its elections and protect the ability of its citizens to cast an "[un]debase[d]" and "[un]dilut[ed]" vote in such elections (Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

The Court should grant certiorari to resolve the tension between Buckley, on the one hand, and cases such as Holt Civic Club, Timmons, and Reynolds v. Sims, on the other hand, in the context of campaign finance reforms such as Measure 6.

I. MEASURE 6 IS SUPPORTED BY OREGON'S INTEREST IN ENHANCING SELF-GOVERNMENT.

Restrictions on the right of political participation based on the fact that a person does not reside within the borders of the governmental unit in question are qualitatively different from other kinds of restrictions for a very fundamental reason: Geography is part and parcel of our very notion of what a governmental unit is. The concept that a person has rights, and should have rights, of political participation depending on where that person resides is a concept deeply embedded in the Constitution[2] and in our

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[2] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Fourteenth Amendment, §1.

nation's history. It is part of what we mean when we speak of self-government. People living in a particular community expect to have a say in how the community in which they reside is governed, particularly with regard to matters perceived as being of "local" concern. Indeed, as discussed further below, this is what our federal form of government guarantees. Consequently, the strength of Oregon's interest in protecting the integrity and vitality of state elections, and of the right of its citizens to cast meaningful and undiminished votes in such elections cannot be overstated. If the bedrock principle of American democracy is that government can derive "just powers" only from "the consent of the governed," efforts by states to enhance the immediacy and directness of the connection between local electorates and their elected representatives must be regarded with the greatest deference.

II. THE BURDEN MEASURE 6 IMPOSES ON OUT-OF-DISTRICT VOICES IS BENIGN.

In his dissenting opinion, Judge Brunetti identifies several aspects of Measure 6 which render its restriction on out-of-district speech relatively mild and benign.

Beyond these aspects, however, it is important to emphasize that Measure 6's restriction on speech is benign for other reasons as well.

First, the restriction is not based on the content of the speech in question.

Second, the restriction is not focused on any identifiable element of society, or any identifiable characteristic of the

would-be contributor other than that the contributor resides outside of the borders of the governmental unit in question.

Third, the restriction itself serves and advances First Amendment interests. As observed by Judge Skelly Wright, the views of Alexander Meiklejohn are particularly instructive in this context:

> Meiklejohn saw self-government as the fundamental principle of the first amendment. Freedom of expression, he wrote, was the indispensable prerequisite for informed, rational decisionmaking; it was therefore essential to a self-governing populace of political equals bound by a voluntary compact . . . .
>
> Meiklejohn made a perceptive distinction between abriding speech -- which is sometimes permissible -- and abriding the freedom of speech -- which is almost always forbidden. His analogy was the town meeting, the paradigm of the direct demoncratic ideal. There, he noted, regulating and abridging communication is necessary for orderly presentation and intelligent deliberation . . . . In Meiklejohn's view, the first amendment protects not the individual's desire for self-fulfillment but the collective thought processes of the community.
>
> J. Skelly Wright, "Money and the Pollution of Politics: Is the First

> Amendment an Obstacle to Political Equality," 82 Colum. L. Rev. 609, 638-39 (1982) (citing A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948))(footnotes omitted).

Citing Meiklejohn's views, Judge Wright argued that

> It is to prevent mutilation of these communal thought processes that campaign finance reforms are so essential.
>
> Id. at 639.

Applying this analysis here shows Measure 6 to be not a violation of the First Amendment but an instrument permissibly designed to advance "communal thought processes" in a manner analogous to the rules of procedure at Meiklejohn's symbolic town meeting.

III. MEASURE 6 IS A PERMISSIBLE EXERCISE OF STATE SOVEREIGNTY.

2 U.S.C. §441e prohibits foreign nationals from making campaign contributions in connection with an election

> to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office . . . .
>
> 2 U.S.C. §441e(a).

For purposes of this statute, a foreign national is defined as

> (1) a foreign principal, as such term is defined by section 611(b) of title 22, except that the term "foreign national" shall not include any individual who is a citizen of the United States; or
>
> (2) an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence . . . .
>
> 2 U.S.C. §441e(b).

Accordingly, even refugees and individuals on temporary visas actually residing in the United States are prohibited by this statute from making campaign contributions to candidates for local, state or federal office. See D. Ballman, "Political Campaign Contributions by Foreign Nationals in Florida Elections," 65 Fla. B.J. 31, 32 (March 1991)("Ballman").

In describing the rationale for this statute, Senator Lloyd Bentsen, one of its sponsors, stated:

> [A]ll of us have heard the stories . . . in recent months of the enormous amounts of money contributed in the last political campaign by foreign nationals . . . .
>
> I do not think foreign nationals have any business in our political campaigns. They cannot vote in our elections so why should we allow them to finance our elections?

> Their loyalties lie elsewhere, they lie with their own countries and their own governments.
>
> Quoted in Ballman, supra, 65 Fla. B.J. at 31 (March 1991).

The rationale for Measure 6 is directly analogous to the rationale articulated by Senator Bentsen. Out-of-district residents cannot vote in district elections; their loyalties lie elsewhere; Oregon's citizens are concerned that their campaign contributions pose a risk of corruption and threaten the integrity of district elections. Just as it is a permissible exercise of federal sovereignty for the federal government to prohibit campaign contributions by foreign nationals; so it is a permissible exercise of state sovereignty for Oregon to restrict campaign contributions by individuals residing out of district.

As stated in Oregon v. Mitchell, 400 U.S. 112, 124-25 (1979),

> the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power . . . to regulate the elections of their own officials . . . .

A state's power over its own elections lies at the very heart of state sovereignty. As recognized in Gregory v. Ashcroft, 501 U.S. 452 (1991), decisions regarding "the qualifications of its officers and the manner in which they are chosen" (Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 161 (1892)) are decisions

> of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise governmental authority, a State defines itself as a sovereign.
>
> 501 U.S. at 460.

Accordingly,

> It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . [and] the manner of their election . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.
>
> Taylor v. Beckham, 178 U.S. 548, 570-71 (1900).

This Court has explicitly recognized the unique nature of state decisions that "go to the heart of representative government [,]" Sugarman v. Dougall, 413 U.S. 634, 647 (1973),

> Gregory v. Ashcroft, supra, 501 U.S. at 461,

in formulating the "political function" exception to the rule that discrimination based on alienage triggers strict

scrutiny. As explained in Bernal v. Fainter, 467 U.S. 216, 221 (1984),

> The rationale behind the political function exception is that within broad boundaries a State may establish its own form of government and limit the right to govern to those who are full-fledged members of the political community. Some public positions are so closely bound up with the formulation and implementation of self-government that the State is permitted to exclude from those positions persons outside the political community, hence persons who have not become part of the process of democratic self-determination.

Further, as this Court stated in Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982),

> The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of the community.

The rationale of the "political function" exception applies here as well: Measure 6 is a permissible exercise of state sovereignty because it draws a distinction --

between in-district and out-of-district campaign contributors -- reasonably based on a community's political self-definition.

IV. UPHOLDING MEASURE 6 WOULD BE IN THE BEST INTERESTS OF DYNAMIC FEDERALISM.

In recent years, this Court has spoken on more than one occasion of the virtues of our federalist system -- "the unique contribution of the Framers to political science and political theory" (United States v. Lopez, 514 U.S. 549, 575 (1995)(Kennedy, J. concurring) -- and of the benefits to be gained by observing its tenets. E.g., Gregory v. Ashcroft, 501 U.S. 452 (1991); United States v. Lopez, 514 U.S. 549 (1995); Printz v. United States, 117 S.Ct. 2365 (1997). As stated in Gregory, the

> federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. See generally McConnell, Federalism: Evaluating the Founders' Design, 54 U.Chi.L.Rev. 1484, 1491-1511 (1987); Merritt, The Guarantee Clause and

State Autonomy: Federalism for a Third Century, 88 Colum.L.Rev. 1, 3-10 (1988).

501 U.S. at 458.

Upholding Measure 6 would be in the best interests of dynamic federalism for three reasons.

First, by voting to make Measure 6 part of their state constitution, the people of Oregon made a judgment that this campaign finance reform would be in the interest of

> [p]reserving the integrity of the electoral process, preventing corruption, . . . "sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" [United States v. Automobile Workers, 352 U.S. 567, 575 (1957)) . . . [and preserving] . . . the individual citizen's confidence in government . . . .
>
> First National Bank of Boston v. Bellotti, 435 U.S. 765, 788-89 (1978).

Simply the prospect that the people who voted for Measure 6 may have been correct in this judgment ought to give pause to any court asked to set the Measure aside. Indeed, as to confidence in government, who would be in a better position to know whether Measure 6 would indeed instill greater confidence in government than the voters themselves?

Second, apart from whether the judgment of Oregon's voters was correct, there can be little question that, as discussed in section III above, the subject of Measure 6 -- the regulation of state elections -- is a subject uniquely entrusted to the states themselves by our federalist system. Consequently, setting aside a state's judgments on such a subject necessarily takes a toll on the concept of federalism, and the voters' confidence in that concept. Conversely, upholding Measure 6 would instill confidence in the reality of a federalism that truly respects state sovereignty.

Third, two political realities of recent years seem undeniable: one, the enormous public support for campaign finance reform; two, the enormous difficulty federal politicians have had in agreeing on reform legislation. These two realities create a need and an opportunity for the states to innovate and experiment in this area in the best tradition of our federalist system. Upholding Measure 6 would help enable states to play an active role in this area.

V. NEITHER THE FACT THAT MEASURE 6 WAS PASSED BY INITIATIVE RATHER THAN LEGISLATIVE VOTE, NOR THE FACT THAT THE PETITION FOR CERTIORARI WAS FILED BY INTERVENOR MILLER RATHER THAN OREGON'S ATTORNEY GENERAL, SHOULD DETER THIS COURT FROM GRANTING CERTIORARI.

Proponents of campaign finance reform face an obvious difficulty in getting reforms, however meritorious, enacted because the very representatives asked to pass the reforms

were themselves elected under the finance system that is the target of the proposed reforms. Accordingly, those representatives wishing to be re-elected naturally wonder whether they will fare as well under a reformed campaign system as under the tried and true system to which they owe their offices, and frequently cannot help but regard themselves as having a vested interest in maintaining the status quo. Consequently, it is hardly surprising that those campaign finance reforms that are passed on the state level are often passed by initiative, rather than legislative, vote.

Accordingly, this Court should not regard the fact that Measure 6 was passed by initiative as a factor weighing against the grant of certiorari. On the contrary, that Measure 6 was passed directly, by the votes of 628,180 Oregonians (Pet. for Cert. 10, citing App. 54), actually makes this case a particularly appropriate one for resolving the important issues presented. For, as noted in section IV above, the voters themselves are uniquely qualified to express what campaign finance reforms would instill in them greater confidence in the electoral process.

For the very same reasons, the fact that the petition for certiorari before the Court was filed by intervenor Miller rather than Oregon's Attorney General, should also not be regarded as weighing against the grant of certiorari. In Oregon, the Attorney General is elected, not appointed. Or.Rev.Stat. §180.020. Consequently, the holder of that office may have the same natural resistance to reform of the campaign finance system that an elected legislator might have. In any event, the Attorney General's decision -- for whatever reason -- not to seek certiorari himself on a Measure passed directly by Oregon voters should not be taken as counting against the appropriateness of certiorari,

especially where the Measure pertains to campaign finance reform, an issue on which the voters themselves speak with such immediacy.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: December 1998

Respectfully submitted,

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